No. 11799.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a corporation, R. H. McKEON, individually, GEORGE B. PAGE, individually, R. H. McKEON and G. B. PAGE, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, GEORGE B. PAGE, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company, FLOYD GILBERT, ROBERT ECHOLS and BEVERLY ECHOLS,

Appellees.

BRIEF OF APPELLANT.

HARRY E. SACKETT,
RAYMOND G. BROWN,
810 South Spring Street, Los Angeles 14,
Attorneys for Plaintiff.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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I.

STATEMENT OF THE CASE.

1. The Parties.

This action was brought by United Pacific Insurance Company, a corporation, against The Ohio Casualty Insurance Company, a corporation; R. H. McKeon, individually; George B. Page, individually; R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners; George B. Page,

individually and doing business under the fictitious name of Mission Linen and Towel Supply Company; Floyd Gilbert; Robert Echols, and Beverly Echols. The parties stand in the same relative positions in this Court that they did in the Court below. Appellant will be referred to as "United" and The Ohio Casualty Insurance Company, appellee, will be referred to as "Ohio." The defendants in the District Court, R. H. McKeon, individually, will be referred to as McKeon; George B. Page, in his individual capacity, will be referred to as Page; R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, will be referred to as McKeon and Page dba Pacific Laundry; George B. Page, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company, will be referred to as Page dba Mission Linen; Floyd Gilbert will be referred to as Gilbert; Robert Echols and Beverly Echols will be referred to as claimants.

Reference will be made to the printed pages of the transcript of the record as TR.

2. The Jurisdictions.

The jurisdiction of the District Court was invoked under the provisions of Section 274d of the Judicial Code, as amended, 28 U. S. C. A. 400,[1] and under Section 24

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[1] "(1) In cases of actual controversy except with respect to Federal taxes the Courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declarations, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction

of the Judicial Code, 28 U. S. C. A. 41.[2] The amount in controversy was admittedly more than $3,000.00. United is a citizen of the State of Washington. Ohio is a citizen of the State of Ohio. The other defendants were citizens and residents of the State of California at the time the action was filed, with the exception of Gilbert who had departed from the jurisdiction. This Court has jurisdiction. (*Maryland Casualty Co. v. Pacific Coal and Oil Co.,* 312 U. S. 270, 85 L. Ed. 826, 61 S. Ct. 510.)

3. The Pleadings.

United filed the action November 26, 1946, alleging that it brought the proceeding under Section 274d of the Judicial Code; that it was a corporation of the State of Washington engaged in the casualty insurance business and duly licensed to transact such business in the State of California; that Ohio was a similar corporation, organized under the laws of the State of Ohio and licensed to transact casualty business in the State of California; that the individual defendants were natural persons and citizens of the State of California; that the amount in controversy exceeded $3,000.00, exclusive of interest and costs; that Page engaged in various business enterprises, sometimes as an individual and at other times as a co-

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to grant the relief. If the application be deemed sufficient, the Court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

[2]"The district courts shall have original jurisdiction * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, * * * is between citizens of a State and foreign States, citizens, or subjects."

partner under various fictitious names; that one of these enterprises in which Page engaged was known as Mission Linen and Towel Supply Company; that McKeon and Page engaged in a separate business enterprise as co-partners under the fictitious name of Pacific Laundry and Dry Cleaners.

That on September 18, 1945, United issued a policy of automobile liability insurance to Page individually and dba Mission Linen, as well as under other fictitious names not pertinent to the issues here; that the policy provided indemnity in favor of Page because of injuries to members of the public, with a limit of $10,000.00 as applicable to one person and subject to that limit for each person, the sum of $25,000.00 for each accident giving rise to claims or suits against him, and $5,000.00 for damage to property of others; that the policy contained a provision relative to other insurance which, in substance provided that insurance under the policy should not be construed to be concurrent or contributing with any other available insurance.

That on January 16, 1946, Gilbert was driving a truck registered in the name of Page dba Mission but on the business of McKeon and Page dba Pacific Laundry, at which time claimants were injured; that Ohio had issued a policy to McKeon and Page dba Pacific Laundry and that the policy of Ohio applied to the accident, but that Ohio refused to accept responsibility; that claimants had brought action in the Superior Court of the State of California in and for San Luis Obispo County; that the defendants in the action for damages in the state court were McKeon and Page dba Pacific Laundry, Page dba Mission, and Gilbert, driver of the accident vehicle.

That an actual controversy existed in that United maintained that Ohio had the responsibility of providing a de-

fense to the action for damages in the state court and paying any judgment rendered therein, up to the limits of its policy, which were $25,000.00 for one person; $50,000.00 for each accident resulting in injury to more than one person, and $5,000.00 for damage to property of others; that Ohio declined to accept responsibility, claiming that it did not have the responsibility, but that United covered the accident and was liable under its policy. United prayed for a speedy hearing of the cause; that the Court declared it had no responsibility in connection with the accident, but that the liability rested upon Ohio, and for such other and further relief as to the Court should seem just, meet and proper [TR. 2 to 10]; that the personal liability of Gilbert was covered by Ohio's policy.

Ohio filed an answer in which it set up the issuance of its policy of insurance in substantially the terms alleged in United's complaint, but it alleged further the provisions of a general endorsement to the effect that Ohio's liability did not attach to the liability of Page "a partner, for his personal non-business exposures or activities, or his liability in connection with other business activities as an individual, a director, or an executive officer of a corporation." [TR. 15, 17.]

Ohio further averred that the liability of United was primary and that its liability, if any, was secondary. Ohio joined in the prayer for a declaration of rights and prayed for general relief. [TR. 17, 18, and 19.] United attached to its complaint a copy of its policy of insurance. [TR. 11.] Ohio attached to its answer a copy of its policy of insurance. [TR. 20.]

Claimants Robert Echols and Beverly Echols, filed an answer pleading substantially that they were entitled to compensation from one if not both United and Ohio, and

praying for general relief. Neither Page individually nor dba Mission, nor McKeon and Page dba Pacific Laundry answered or otherwise pleaded.

4. The Facts and Issues.

On April 26, 1947, the District Court entered an order for pre-trial hearing requiring the parties to agree insofar as possible on the facts and issues and to state their separate contentions on the issues upon which they could not agree. [TR. 30.]

United and Ohio entered into a stipulation of facts and issues. [TR. 34.] Claimants joined. Diversity of citizenship and that the amount in controversy in excess of $3,000.00 was stipulated. It was agreed that the controversy arose out of an accident of January 16, 1946; that the accident vehicle was driven by Gilbert. That at the time of the accident the insured truck was registered to Page dba Mission Linen, but that it was leased to McKeon and Page dba Pacific Laundry; that it was actually operated at the time of the accident by an employe of McKeon and Page dba Pacific Laundry, and on the business of McKeon and Page dba Pacific Laundry. [TR. 34.] The occurrence of the accident and the filing of the suit by claimants in the Superior Court of California at San Luis Obispo was stipulated. The extended coverage clauses of both policies were set forth. [TR. 37-38.] While both policies were issued on what is known in the insurance business as a comprehensive liability form, they differ insofar as extended coverage—insurance to persons other than owners or named insureds—is concerned. United's policy admittedly covered the personal liability of Gilbert, subject to the limitations otherwise contained in the contract. Ohio's policy covered "with respect to automobiles owned by or registered in the name of the Named

Assured * * * any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured." [TR. 37.]

The parties were unable to agree entirely and stated their separate contentions. [TR. 40.] United contended that California law applied to both policies; that the accident vehicle was "owned by or registered in the name of the Named Assured" of Ohio's policy; that since the accident vehicle was being used in the furtherance of the business of Ohio's assured and by its employee, the policy of Ohio applied to the exclusion of United's policy; in the alternative, that there was double insurance and that both companies were liable in proportion to the limits of liability stated in the respective policies; that there was a total of $35,000.00 applicable to the accident, $10,000.00 of which was provided by United and $25,000.00 of which was the liability of Ohio; that United was liable for 2/7 of the loss and Ohio for 5/7.

Ohio also contended that the substantive law of California controlled; that its policy excluded any activities of Page and that Page dba Mission Linen was not an assured thereunder; that the accident vehicle was not one "owned by or registered in the name of the Named Assured" within the meaning of its policy; that Gilbert's personal liability was not covered by Ohio's policy; that United covered the personal liability of Gilbert and on the theory that the master could subrogate against a negligent servant and thereby reach the insurance carrier protecting the negligent servant, and United being such insurer, therefore had the primary liability and Ohio the secondary; and in the alternative, that should it be found that both policies provided concurrent insurance, the "other insurance" clauses cancelled each other and that Ohio's lia-

bility was excess after the liability of United was exhausted. [TR. 34 to 43 incl.]

The pertinent provisions of United's policy were attached to the stipulation. [TR. 44.] Likewise the applicable provisions of Ohio's policy were attached. [TR. 48.] General Endorsement No. 3, relied on by Ohio, was attached. [TR. 51.] Certificate of Insurance issued by Ohio to Camp Cooke Post Exchange, hereinafter referred to as Certificate of Insurance, relied on by United to show that Ohio covered the personal liability of Gilbert, was attached. [TR. 50, 51.]

The case was tried to the Court without a jury, beginning June 13, 1947. [TR. 81.] It was stipulated at the beginning of the trial that Ohio's assured, McKeon and Page dba Pacific Laundry, had rented and exclusively used the accident vehicle for a period of one year prior to the accident from United's insured and that Ohio's assured had paid rental on the truck throughout that period and had a sign painted on the truck as follows "Pacific Laundry." [TR. 81.]

Gilbert was never served in the state court action for damages by claimants. Settlement with claimants was made subsequent to the trial of the instant case for $10,250.00. Ohio paid $5125.00 and United a like amount. [TR. 208.]

Gilbert was not served in this action. The return of the Marshall shows that he had departed from the state. [TR. 84.] He was dismissed as a party. [TR. 84.]

During the trial Ohio placed great reliance upon its General Endorsement No. 3 purporting to limit its coverage to the activities of McKeon and Page dba Pacific Laundry. [TR. 50, 51.] United placed importance on Certificate of Insurance attached to Ohio's policy which contained a description of the risk assumed by Ohio as

applicable "to all automobiles owned *or operated by the insured.*" [TR. 51.] (Emphasis added.)

The milestone of the case was reached when both United and Ohio conceded in open court that their liabilities were equal in the state court action for damages by claimants. United conceded that both companies were liable and that the liability should be prorated in accordance with California law. Ohio conceded equal liability except as to Gilbert. [TR. 108.] The existence of double insurance was conceded. [TR. 109.]

The liability of United arose by reason of Section 402 of the Motor Vehicle Code of California.[3]

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[3] "Liability of Private Owners.

"(a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

"(b) The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant is limited to the amount of five thousand dollars for the death of or injury to one person in any one accident and subject to said limit as to one person is limited to the amount of ten thousand dollars with respect to the death of or injury to more than one person in any one accident and is limited to the sum of one thousand dollars for damage to property of others in any one accident.

"(c) In any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this State. Upon recovery of judgment, recourse shall first be had against the property of said operator so served.

"(d) In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner is subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner."

Such liability is vicarious. The statute makes the registered owner of a motor vehicle liable but provides that the assets of the driver must first be exhausted and also that the owner is subrogated to the rights of claimant or creditor against the driver.

Ohio's liability arose by operation of law; Gilbert was the agent and servant of McKeon and Page dba Pacific Laundry when the liability to claimants was incurred.

The issues thus raised for determination are whether or not there can be contribution among joint tort-feasors for the benefit of the respective liability insurers where neither of such joint tort-feasors participate personally in the tort. The liability of Ohio's assured was derivative. The liability of United's insured was also derivative and vicarious. Under such a situation can one such tort-feasor subrogate against the other? Does the right of contribution exist between two such joint tort-feasors where the liability is derivative only? A second issue tried in the court below had to do with a determination of the extent of coverage of Ohio's policy as to Gilbert. The trial court found that Ohio's policy did not cover his personal liability; the District Court found in effect that McKeon and Page dba Pacific Laundry can subrogate against Gilbert, although he was a stranger to the record and dismissed from the case, and thus reach the proceeds of United's policy. [TR. 70.] Hence, this appeal.

II.

SPECIFICATION OF ERRORS.

In writing this brief and correlating the law on the various points which United wishes to bring to the attention of this Court it has been found that some of the points set forth in the statement of points to be relied upon [TR. 75] necessarily merge with each other, and for that reason the points to be relied upon in the Court of Appeals, while the same in substance, are re-arranged under the following headings:

1. The District Court Erred in Finding and Holding That the Personal Liability of Gilbert Was Not Covered Under the Ohio Policy, for the Following Reasons:

   (a) Under Certificate of Insurance Ohio's policy issued subsequent to the contract itself, coverage applied to all automobiles "owned or operated" by Ohio's assured.

   (b) Under the Statute in California any person named in a policy of automobile insurance is an owner of the motor vehicle.

   (c) Under the aggregate theory of partnership as it obtains in California, the accident vehicle was "an automobile owned by or registered in the name of" Ohio's Named Assured.

2. The Right of Contribution Does Not Exist in California Between Joint Tort-Feasors. Neither Does the Right of Subrogation Exist Between Liability Insurers of Joint Tort-Feasors.

3. There Is Double Insurance, Admittedly and by Statute and Therefore Both Companies Are Liable in Proportion to the Limits of Liability Stated in the Respective Policies.

4. The Court Erred in Failing to Follow the Rule of Erie Railroad Company vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

III.

SUMMARY OF ARGUMENT.

The District Court applied the doctrine of subrogation in favor of Ohio's assured against Gilbert in order to reach the policy of United. As stated by this Court in *American Surety Company v. Bank of California,* 9 Cir. 133, F. (2d) 160, 162, the right of subrogation is a creature of equity, applicable where one person is legally required to pay a debt for which another is primarily responsible, and which the latter should in equity discharge. There was no equity in holding United liable when the loss occurred out of the business operations conducted by Ohio's assured. The District Court overlooked the fact that both Ohio's assured and United's insured were joint-tort-feasors and that the doctrine of subrogation cannot be applied in favor of a liability insurer of one of the joint tort-feasors. The District Court failed to follow in this respect the decision of the Supreme Court of California in *Smith v. Fall River Joint Union Highschool District,* 1 Cal. (2d) 331, 34 P. (2d) 994.

United will maintain in this Court that the District Court erred in several respects in reaching the conclusion that Ohio's policy did not cover the personal liability of Gilbert: (1) by a Certificate of Insurance issued subsequent to the policy itself, Ohio stated that its coverage

applied to all automobiles owned or *operated by* its assured. (Emphasis added.) The special endorsement controlled. The printed form of the original policy was relegated to the background. As stated by this Court in *Tarleton v. DeVeune*, 9 Cir. 113 F. (2d) 290, 132 A. L. R. 343, certiorari denied 312 U. S. 691, 85 L. Ed. 1127, 61 S. Ct. 710:

> "Where a printed provision of a policy is inconsistent with a rider, the rider controls," citing 7 Cal. Jur. Ten Year Supp. 92, Sec. 28.1.

(2) By statute in California, the Legislature undertook to and did state what a policy of insurance should contain (Sec. 381 of the Insurance Code) and in Section 383.5 defined an owner of a motor vehicle as any one named in a policy of insurance, and therefore, McKeon and Page dba Pacific Laundry were the owners of the accident vehicle for the purpose of construing Ohio's policy.

(3) Under the California law, a partnership is not an entity separate and apart from the members composing it. To the contrary, California holds to the aggregate theory of partnerships and for that reason each partner owned the property of the other.

United will further maintain in this Court that the right of subrogation does not exist in California between insurers of joint tort-feasors even though their liability is derivative only and not culpable. It is contended that this point has been settled by the Supreme Court of California and that the trial court should have held likewise in accordance therewith. It will be urged further by United, that under the California statute there was double insurance, and therefore, the liability of the two insurers should have been fixed in proportion to the limits stated in their respective policies.

IV.

ARGUMENT.

1. **The District Court Erred in Finding and Holding That the Personal Liability of Gilbert Was Not Covered Under the Ohio Policy for the Following Reasons:**

(a) Under General Endorsement No. 4 of Ohio's Policy, Issued Subsequent to the Contract Itself, Coverage Applied to All Automobiles "Owned or Operated" by Ohio's Assured.

During the trial much time was devoted to the construction of Ohio's policy with regard to the personal liability of Gilbert. The milestone of the case was reached when both Ohio and United conceded that their obligations were equal except as to coverage applicable to Gilbert. [TR. 108, 109.] In the printed part of Ohio's policy, coverage for the benefit of persons other than those named as Assureds was limited to persons "while using automobiles owned by or registered in" the name of the Named Assured. [TR. 49.] The Certificate of Insurance attached as a rider to Ohio's policy [TR. 50, 51], clearly states "coverage applies to all automobiles owned or *operated by* the insured." (Emphasis added.) Notwithstanding the provisions of this Certificate of Insurance, the trial court held that Gilbert was not an assured under Ohio's policy, because the accident vehicle was not owned by or registered in the name of Ohio's Named Assured. [TR 61.] We submit that there is an inconsistency between the coverage stated in the Certificate of Insurance and that described in the printed part of the policy, and that the provision in the Certificate of Insurance extending coverage to all automobiles owned *or op-*

erated by the insured should control, and that Gilbert, being the employee of Ohio's Named Assured, and using the accident vehicle in the business of the Named Assured, the accident vehicle was an automobile *"operated by"* the insured, and the coverage of Ohio's policy extended to Gilbert and made him an insured under that policy. The trial court, in holding that Gilbert was not an insured under Ohio's policy, obviously came to the conclusion that the Certificate of Insurance did not modify the Extended Coverage Clause of Ohio's policy, and did not apply to this issue. [TR. 117, 118.] We submit that in this the trial court was in error. This Court stated clearly in *Tarleton v. DeVeune,* 9 Cir. 113 F. (2d) 290, 132 A. L. R. 343.

> "Where a printed provision of a policy is inconsistent with a rider, the rider controls."

To the same effect, see also, 7 Cal. Jur. Supp. 92, Sec. 28.1.

At the time of the accident the vehicle was being used on business of Ohio's assured by a regular employee of Ohio's assured. The accident vehicle had been under the exclusive control of Ohio's assured for about one year prior to the accident. Ohio's assured had caused its trade name to be painted on the side of the truck. [TR. 81.] The Certificate of Insurance unquestionably written to clear up any doubt in the minds of the parties as to whether coverage extended to all automobiles owned by or *operated* by Ohio's assured, and certainly takes precedence over anything to the contrary in the body of the policy.

(b) Under the Statute in California Any Person Named in a Policy of Automobile Insurance Is an Owner of the Motor Vehicle.

The Legislature of California adopted an Insurance Code and Section 383.5 deals with insurance on motor vehicles. The pertinent provisions of that section are as follows:

> "Contracts of Motor Vehicle Insurance: Definitions: Embodiment of Contract in Document: Delivery: Suspension or Revocation of Agent's License or Insurer's Certificate of Authority: Purpose of Section.
>
> 'Document,' as used in this section, means a policy or a certificate evidencing insurance under a master policy. Such policy or certificate shall conform to Section 381 and shall segregate the premiums charged for each risk insured against. Such a certificate, in lieu of specifying the risks insured against, may designate them by name or by description.
>
> 'Owner' as used in this section means any person who is named as an insured in such contract of insurance or document, or in a loss payable clause therein, and, whether or not he is named therein, the vendee, pledgor, or chattel mortgagor of a motor vehicle where insurance contracts subject to this section are procured with respect to the motor vehicle by or on behalf of either party to the purchase, pledge, or mortgage.
>
> Every contract of insurance against hazards incident to ownership, maintenance, operation and use of motor vehicles shall be embodied in a document.
>
> * * * * * * * *

> The purpose of this section is to prevent fraud or mistake in connection with the transaction of insurance covering motor vehicles and in furtherance of that purpose the commissioner may make reasonable rules and regulations therefor."

Therefore, under Section 383.5 of the Insurance Code, McKeon and Page dba Pacific Laundry were the owners of the accident vehicle. Therefore, Gilbert, their agent and servant, while driving with their permission and in the course of his employment, was protected by Ohio's policy, and became an additional insured under the Extended Coverage clause of that policy. The holding of the District Court to the effect that Ohio could subrogate against Gilbert as a negligent employee of its insured, was clearly erroneous. It is elementary that one cannot subrogate against himself.

(c) Under the Aggregate Theory of Partnership as It Obtains in California the Accident Vehicle Was "an Automobile Owned by or Registered in the Name of" Ohio's Named Insured.

McKeon and Page dba Pacific Laundry were named as Ohio's assureds. They were partners. Under California law a co-partnership is not a legal entity. *Park v. Union Manufacturing Company* (1941), 45 Cal. App. (2d) 401, 114 P. (2d) 373. In that case Fannie S. Park was employed as a garment worker by the Union Manufacturing Company, a co-partnership composed of M. Harris and his wife, Anna Harris. The partnership business was conducted in a building owned by Harris and his wife. On February 18, 1936, while employed by the co-partnership, Fannie S. Park sustained injuries when an elevator in the building dropped from the fifth to the first floor.

Prior to the accident Harris had secured a policy of workmen's compensation insurance covering his employees in which the employer was designated as "M. Harris dba Union Manufacturing Company." Fannie S. Park filed claim for compensation with the California Industrial Accident Commission. She named Union Manufacturing Company as her employer and Pacific Employers Insurance Company was named as the insurance carrier. Thereafter in February of 1937, Fannie S. Park instituted an action for damages because of the injuries sustained in the same accident. She named as defendants Union Manufacturing Company, a co-partnership composed of M. Harris and Mrs. M. Harris as well as M. Harris and Mrs. M. Harris, individually, and Kurt Kunich, who was operating the elevator at the time of the accident. At the beginning of the trial and on motion of Union Manufacturing Company, all defendants were dismissed except M. Harris. Trial resulted in judgment against him in favor of Fannie S. Park for $2500.00, the trial court having found, among other things, that M. Harris was the owner and operator of the M. Harris building; that he was not the employer of Fannie S. Park on February 18, 1936, and that Union Manufacturing Company by whom the plaintiff was employed at the time of the injury was a separate and distinct entity. On appeal, the judgment and findings of the trial court were reversed. It is believed that the language of the Court in that case applied with equal force to the facts in the case at bar and for that reason quote at length from the opinion, as follows, pages 375, 376, 114 Pac. (2d):

> "In order to answer the questions thus presented, it should first be determined whether the Union Manufacturing Company, a co-partnership composed of M. Harris and Anna Harris, is an entity separate

and distinct from M. Harris, as owner of the building in which the accident occurred.

Appellant, when called as a witness under Section 2055 of the Code of Civil Procedure, testified that he was the owner of a seven story building, commonly known as the Harris Building, which was occupied by the Union Manufacturing Company except for the ground floor and three rooms on the third floor; that the Union Manufacturing Company in February of 1936 paid $1,800 per month rental to the M. Harris Building; that this rental was paid directly to him, said appellant. Later in the trial, said witness was asked by his attorney to explain to the court the manner or process by which payment of said rentals was made, whereupon said witness stated: 'When I made a loan on the building, the company demanded a statement of how much the building is bringing in, and for that purpose we established the value of the rentals and how much that building is bringing in so I could make the loan, and not for any other reason. In fact, the lot that I purchased was purchased with money from the Union Manufacturing Company.' He was then asked to explain what connection he had with the Union Manufacturing Company, to which he replied: 'Well, the Union Manufacturing Company was in business for 15 years, and we needed larger quarters, and I took the money from the Union Manufacturing Company and purchased a lot; then I borrowed money for the Union Manufacturing Company to put up the building. As a matter of record, we have to keep books to know how much that building is bringing in and how much the business is bringing in, but it is being done by the same bookkeeper by the same management.' He also testified that no one except himself and his wife had any interest in the Union Manufacturing Company,

and that the M. Harris Building stood in his name. Two policies of insurance were introduced in evidence, in one of which the named insured appears as 'M. Harris, doing business as M. Harris Building'; and in the other as 'M. Harris dba Union Manufacturing Company.'

A search of authoritative sources upon the subject of the entity theory of partnerships discloses the following: 'A partnership is not ordinarily regarded as strictly a legal entity distinct from the individuals composing it and having an independent existence nor as a person, either natural or artificial, nor as a being, or a legal being. However, there is some authority to the contrary, holding broadly that a partnership is an entity separate and apart from its members, or that it is a legal but not a social entity, and it has even been said that it is recognized in law as a person, or at least as a *quasi* person. Further, whether or not a partnership is to be regarded as a distinct entity for all purposes, the courts frequently have so regarded it with reference to particular rights and obligations, particularly courts of equity, and there is a general tendency at this day to complete the recognition of a partnership as a body of itself with its own means appointed to its own debts. So the entity of the partnership as such has frequently been recognized with reference to its ownership of property, the taxation of its property, its contracts with third persons, the rights of its creditors, including rights under insolvency and bankruptcy laws, the exemption of its property from execution for the debt of the partnership or of individual partners, and its liability for tort, although it cannot, as such be guilty of a crime.' 47 Cor. Jur. 747, Sec. 172.

'The theory that a partnership is a legal entity distinct from and independent of the persons composing

it has been repeatedly affirmed. In the Roman law the partnership was known as *"societas,"* and in those jurisdictions where the Roman law is the basis of the jurisprudence, the entity of the partnership is frankly recognized, and actions are even allowed between the partner and the partnership. It has been said that the notion that the firm is an entity distinct from its members has grown in popularity, and that the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. Furthermore, the current authorities construing and applying the Bankruptcy Act of 1898, 11 U. S. C. A. Sec. 1 *et seq.,* agree that, in contemplation of that statute, a partnership is a distinct separate entity from the individual partners who compose it, and that a proceeding in bankruptcy may be prosecuted against the partnership, and it may be adjudicated a bankrupt without any proceeding prosecuted against the individual members of the partnership and without their being adjudicated bankrupts individually, and similarly that the individual partners may be adjudicated without involving the partnership. On the other hand it has been asserted that the common law does not recognize a partnership as an entity, that a partnership should not be so considered, and that it is to be regretted that decisions on the marshaling of assets under the present bankruptcy law have led to a resurrection of the term. *Amid this conflict of authority the most approved opinion appears to be that which recognizes that a partnership is not an entity like a corporation and that it is not a legal entity,* having, as such, a domicil or residence separate and distinct from that of the individuals who constitute it. Although a partnership is not a person, it may, as a matter of fiction, be treated as a *quasi* person or entity for certain purposes such as

the keeping of partnership accounts and in marshaling assets. In common law jurisdictions this entity for such purposes may be recognized, at least in courts of equity; and it must be conceded that in some jurisdictions the law recognizes a partnership as a person distinct from the individual members of the firm, for it has been held that partners are not directly liable on a debt of the partnership, but that their liability arises out of their connection with the firm, and that it is only traceable through the firm and must be established by a judgment against the firm.' 20 R. C. L. 804, Sec. 6. (Emphasis added.)

'In most respects a partnership is but a relation, with no legal being distinct from the members who comprise it. It is not a person, either natural or artificial. Thus a partnership, as such, cannot be guilty of crime, but the guilt attaches to the delinquent member or members. *But for some purposes, a partnership is regarded as an entity.* One partner may verify an affidavit in the firm name, although a statute requires "all partners" to make the affidavit. And for the purposes of Section 388 of the Code of Civil Procedure allowing associates in business under a common name to be sued by it and their joint property bound by the judgment, a partnership is regarded as a legal entity, distinct from its members, against which judgment may be entered. This is true though the firm has in fact been dissolved after incurring the obligations sued on, and before commencement of the suit. Again, for the purpose of filing an insolvency petition, a partnership has been regarded as an entity and if it did business in the state and one of its members resided therein, the firm was considered to be a resident within the Insolvency Law, though one member resided abroad.' 20 Cal. Jur. 680, Sec. 3. (Emphasis added.)

'Courts of jurisdictions denying the existence of a firm entity distinct from its component members, ordinarily deny the separate existence of two or more firms with an identical membership notwithstanding they may be conducting business under separate names. *But the rule has been so far relaxed as to permit recognition of separate existence under exceptional circumstances.*' 47 Cor. Jur. 750, Sec. 174. (Emphasis added.)

A recapitulation of the authorities cited in the foregoing reveals that in the states of Iowa, Louisiana, Oklahoma, Pennsylvania, South Carolina, Tennessee and Vermont, a co-partnership is regarded as a separate entity, distinct from the individuals of which it is comprised and that the Courts of New York, Minnesota, Mississippi and Texas do not recognize a co-partnership as an entity apart from exceptional situations.

In this latter category is the holding in *Fidelity Phoenix Fire Ins. Co. v. Howard,* 1938, 182 Miss. 546, 181 So. 846, to the effect that a partnership with identical partners under one partnership name is the same partnership when conducting some other portions of its business under another name, and the separation of bookkeeping and of all operations and details thereof is immaterial since ownership and ultimate control are still in the partners who compose the firm.

That California follows the latter, rule, *i. e.,* non-recognition of the entity theory of partnerships, is evidenced by the opinion in *Reed v. Industrial Acc. Comm.,* 10 Cal. 2d 181, 63 P. 2d 1212, 114 A. L. R. 720, in which case a policy of workmen's compensation insurance issued to an employer who subsequently entered into a partnership was held to cover an injury to an employee of the partnership, the court

holding that the partnership was not a distinct entity apart from the members thereof, that an employee of the partnership was an employee of each of the partners; that no individual partner could escape liability on the ground that the partnership only and not the individuals composing it could be held liable, and that since the partner who procured the insurance was liable for the injury to the employee of the partnership, the insurer was liable on its policy.

"Since it has not been shown to the satisfaction of this court that the circumstances present herein are exceptional, there appears to be no good reason, for a deviation from the rule anounced in the Reed case, *supra*. Consequently, appellant's contention, that the evidence is insufficient to sustain the finding of the trial court to the effect that the Union Manufacturing Company possessed a separate and distinct entity from that of M. Harris, must be sustained.

"For the reasons stated, the judgment appealed from is reversed."

It is submitted that the above is conclusive authority for our proposition that the partnership of McKeon and Page dba Pacific Laundry is not a separate legal entity, and that Page therefore is a named assured within the meaning of Ohio's policy. Page is the same individual, irrespective of the fact that he is a partner in Pacific Laundry. General Endorsement No. 3 upon which Ohio placed so much importance at the trial [TR. 51] "excluding all activities of G. B. Page which are not specified therein" is fully answered by United's argument that Page as a co-partner of McKeon and Page, and named as such in Ohio's policy, was the owner of the vehicle, and the activity in which the vehicle was being used at

the time of the accident, was not such an activity as to bring it within the purview of that Endorsement.

Upon the trial Ohio relied on *National Automobile Ins. Co. v. Industrial Accident Commission,* 11 Cal. (2d) 689, 81 P. (2d) 926. There is a clear distinction between the rule stated in the *National Automobile* cases and the rule relied on by United as laid down in *Park v. Union Manufacturing Company, supra.* In the *National Automobile* case the insuring clause clearly stated the particular business enterprise to be covered. Neither, was there a statute such as Section 383.5 of the Insurance Code, *supra,* applicable. It is submitted that the aggregate theory of partnership still exists in California and that here, not only was each partner an owner of the partnership property, but also that Page was Page wherever found. He was a member of McKeon & Page dba Pacific Laundry; he was also an owner of the accident vehicle. We submit, therefore, that Page, being an owner, and also a named assured of Ohio, is brought squarely within the provisions of the Extended Coverage clause of Ohio's policy, and that the accident vehicle was an automobile "owned by or registered in the name of" Ohio's Named Assured, thus extending coverage under said clause to Gilbert — a person using the automobile with the permission of Ohio's Named Assured.

In 40 *Am. Jur.* 202, *Partnership,* Sec. 107, it is stated:

> "The personal property of a partnership is owned not by the partners individually, but by the partnership. By the contract of partnership, the partners acquire a joint interest in the personal effects of the

partnership. Each partner is possessed *per my et per tout,* that is, the interest of each member of a partnership extends to every portion of its property, and is a joint interest in the whole and not a separate interest in any particular part. This is true both of property contributed by each partner as well as that included in his own contribution. This gives rise to the rule elsewhere considered that each partner has an equal right to the possession and control of the point property."

2. The Right of Contribution Does Not Exist in California Between Joint Tort-Feasors. Neither Does the Right of Subrogation Exist Between Liability Insurers of Joint Tort-Feasors.

In this case the liability of Page is vicarious and arises only by reason of his registered ownership of the accident vehicle. His liability is based only upon Section 402 of the Motor Vehicle Code of California, *supra*. He was in no way culpable. His liability is derivative. Likewise the liability of McKeon and Page dba Pacific Laundry is derivative. They were not culpable. Gilbert left the State of California and, though named in both the action for damages in the State Court and in this proceeding, was never served. Therefore, as between two joint tort-feasors whose liability is derivative only, should there be contribution? Does either have the right to subrogate against the other? Clearly, Page had the right of subrogation, under the provisions of Section 402 of the Vehicle Code, against Gilbert, but Gilbert, being an employee of a co-partnership of which Page was a member, United did not urge that Ohio was liable under the statute. Ohio, however, urged strenuously that it was entitled to subrogate against Gilbert and reach the proceeds of United's policy.

The rule is well settled in California that there can be no subrogation among joint tort-feasors. *Adams v. White Bus Line,* 184 Cal. 710, 195 Pac. 389.

It is equally well settled in California that the right of subrogation does not exist in favor of the insurer of a joint tort-feasor against another. *Smith v. Fall River Joint Union High School District,* 1 Cal. (2d) 331, 34 P. (2d) 994. In that case the defendants in the tort action were the School District, Fitzwater, driver of the school bus, and Pratt, driver of a private automobile. The injured, California Smith, recovered judgment against the three defendants above named. Independence Indemnity Company was the liability insurance carrier on the School District and the defendant Fitzwater. It took an appeal from the judgment in the damage case and also became surety on the supersedeas bond. The judgment was affirmed on appeal and the insurer paid the full amount of the judgment. Thereafter, it sought to recoup its loss against Pratt, one of the joint tort-feasors. Pratt thereupon moved the Court for an order satisfying the judgment as to him. The Supreme Court held that under these circumstances the payment of the judgment by Independence Indemnity Company operated as a complete satisfaction thereof as to the defendant Pratt. In reaching this decision, the Court stated:

> "The appellant, as the indemnitor of the two appealing defendants, was liable for the payment of the judgment against them and such payment gave it no recourse against the respondent as the joint tort-feasor of said defendants for the amount so paid or for any part thereof. It would be most inequitable to permit the appellant to now assert that it paid the judgment as the surety on the appeal bond and not as the indemnitor and thus by application of equitable principles of subrogation escape the liability

which, for an adequate consideration, it had undertaken to discharge, and force such liability upon another who was not a party to said appeal bond and who received no benefit whatever from its execution and delivery" (34 P. (2d) 998.)

"By giving the bond on appeal with itself as surety, it did not in any way enlarge its liability in the premises. It was legally bound to pay the judgment before giving the surety bond. It was no more so after it had executed and delivered the stay bond. The only conceivable change in its legal status which the giving of the bond by itself might work, would possibly be in relation to its rights against the respondent herein. If appellant's contentions are to be sustained, then the Indemnity Company, although it had no right even of contribution against the respondent before the appeal, by taking the appeal and furnishing an appeal bond with itself as surety, created a right against respondent, making him liable not only for contribution, but for the entire amount of the judgment. We do not believe that under the laws of this state the appellant by such indirect methods can enrich itself at the expense of another." (34 Pac. 997.)

A case in which the issues were similar to those raised in this controversy is *Universal Indemnity Ins. Co. v. Caltagirone, et al.,* 119 N. J. Eq. 491, 182 Atl. 862. In that case the indemnity insurer of one of several joint tort-feasors sought to escape the rule that there can be no contribution or subrogation among them by applying to the court for relief, before the payment of the judgment, in somewhat the same manner that Ohio seeks to escape its obligation in this case. In denying the claim of the insurer, the court used the following language:

"The facts in the instant case closely approximate those present in *Fiorentino v. Adkins,* 154 A. 429,

430, 9 N. J. Misc. 446 (Supreme Court). There the insurance carrier of one joint tort-feasor paid a judgment based on a tort action, took an assignment thereof, and sought contribution by issuing execution against the other joint tort-feasor. The court said as to the position of the insurance carrier: 'It stands in its insured's shoes. There is a public policy behind the rule against contribution amongst the joint tort-feasors, and we are unable to see the distinction, in the application of the rule, between a joint tort-feasor and one who, by contractual undertaking, stands in his place. The money paid by the Indemnity Company for the judgment was, in theory, the money of its insured. It was the accumulated premiums paid by the insured against the day when the latter would be called upon to suffer such a loss.'

"This pronouncement of the Supreme Court, which we approve, is, we think, applicable to the instant case.

"(4) The complainant Insurance Company claims a distinction from the above-cited cases, in that here there has been no payment of the judgment, no assignment taken, and no right asserted which has been secured through its insured. This distinction is more apparent than real. Whether the relief sought be based on an assignment or not, whatever the method used to affirmatively seek contribution, the result will be the same; and that result will inure to the benefit of the insured joint tort-feasor. Equity should not be invoked by methods of indirection to nullify a positive rule of law.

"Counsel for the Insurance Company cites decisions of other states, and contends that the rule against contribution should not be applied against the Insurance Company, since its liability arises through a technical rule of law; that the Insurance Company

is innocent of any personal fault or culpability; and that while there can be no contribution between joint tort-feasors where there is actual wrongdoing, on the ground that the law will not undertake to adjust the burden of misconduct, such principle cannot and should not apply against one who, like itself. is entirely innocent of wrong, because the very reason upon which the rule is founded, is lacking.

"The answer to this is that the liability here does not arise through a technical rule of law but because of specific contractual undertaking. Furthermore, what the law may be in other jurisdictions is unimportant in view of the fact that the courts of our state, including this court, have repeatedly held that whether the tort is an intentional wrongdoing or a mere act of carelessness or negligence does not alter the rule that the right of contribution does not exist."

In California, an injured party is not required to elect as between which of two joint tort-feasors he will proceed. This applies in cases where the joint tort-feasors are master and servant. *Schilling v. Central California Ins. Co.*, 45 Cal. App. (2d) 288, 114 P. (2d) 34. In the *Schilling* case, the court considered and disposed of a similar contention to that being made by Ohio in this case. It was there urged that the insurer for the employer had a secondary liability to that of the insurer for the employee whose negligence caused the accident. That case is authority for the proposition that there are no degrees of liability among joint tort-feasors. The case is also authority for the proposition that where double insurance exists, the two insurance carriers should be held liable on a pro-rata basis. This will be discussed further in the following subdivision of this argument.

3. There Is Double Insurance, Admittedly, and by Statute and Therefore Both Companies Are Liable in Proportion to the Limits of Liability Stated in the Respective Policies.

Regardless of the other points heretofore urged in this brief, and irrespective of claimed error of the trial court in holding that Ohio did not cover the personal liability of Gilbert, it is believed that the case should turn on the proposition of double insurance. Section 590 of the Insurance Code of California provides as follows:

> "A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest."

United has appealed for the reason that the decision of the court below places the entire responsibility upon it. Ohio is subrogating and is entitled to subrogate against United under the findings and judgment of the trial court. United believes this to be clearly erroneous and that where double insurance exists the two carriers should be held liable on a proportionate basis.

There are two important decisions by the California courts on this subject. In *Consolidated Shippers, Inc. v. Pacific Employers Ins. Co.* (1941), 45 Cal. App. (2d) 288, 114 P. (2d) 34, Commercial Standard Insurance Company issued a policy of liability insurance whereby it agreed to insure M. L. Harvey and/or Consolidated Shippers, Inc., against liability imposed by law arising from the ownership, maintenance and use of a Chevrolet truck which was owned by Harvey. The limits stated in the policy were $5,000.00 as applicable to injuries to or death of one person, and $10,000.00 for injuries to or death of more than one person in one accident. Pacific Employers Ins. Co. also issued a policy of liability insur-

ance by the terms of which it insured Consolidated Shippers, Inc. only, against liability imposed by law by reason of the operations of all automobiles and trailers *other than those owned by it* which were used for transporting merchandise on a contract basis on account of or for Consolidated Shippers, Inc. The latter policy was further limited to such loss as might result to Consolidated Shippers, Inc. from the operation of trucks and trailers by independent contractors who had executed a prescribed form of blanket hauling contract. The limits of liability under the latter policy were $5,000.00 property damage and $10.000.00 for injury to or death of more than one person.

Each policy contained a provision for the proration of insurance, providing in effect that if the insured carried other insurance against the same loss, the insurer would not be liable for a larger proportion of the entire loss than the amount named in the policy bore to the entire amount of collectible insurance.

While both policies were in effect, Harvey was transporting merchandise in his Chevrolet truck covered by the Commercial policy pursuant to contract with the Consolidated Shippers, Inc. and became involved in an accident resulting in death of two persons. The accident occurred in Arizona and two actions to recover damages were instituted against Harvey and Consolidated Shippers, Inc. Prior to trial date, the parties stipulated, without admitting liability, to a compromise judgment being entered in favor of the plaintiffs in the damage actions for an aggregate amount of $11,000.00.

In order to comply with the terms of Arizona law regarding interstate motor freight carriers, Harvey entered into an agreement with Consolidated Shippers, Inc. reciting that he had leased the Chevrolet truck to the cor-

poration. The agreement was executed and filed in the State of Arizona prior to the happening of the accident. Evidence was introduced on the trial of the case in an effort to show that, notwithstanding the apparent relationship between Harvey and the corporation arising out of the lease agreement, at the time of the accident Harvey was actually an independent contractor and not an employee of Consolidated. Upon such evidence the trial court found that Commercial was primarily liable under its policy and that Pacific's policy was secondary insurance which did not attach or become collectible until the limits of Commercial's policy had been exhausted.

On appeal, the judgment of the trial court was reversed, as disclosed by the following quotation from the opinion, pages 35, 36, 37, 114 P. (2d):

> "The contention of Commercial that the finding or conclusion of the trial court to the effect that its policy afforded primary coverage and Pacific's secondary coverage is not supported by the evidence and is contrary to law must be sustained. So far as plaintiff is concerned, the risk covered by each policy was the same. The Commercial policy afforded plaintiff insurance against loss resulting from any liability arising out of the maintenance or use of the Chevrolet truck. By the Pacific policy plaintiff was insured against loss resulting from any liability arising out of the operation of any truck, although it was not specifically described in the policy. While it is true that the Commercial policy covered Harvey as well as plaintiff, there can be no doubt so far as plaintiff is concerned that the risks covered by both policies were co-extensive. If the policies had in effect the same coverage, neither could be primary but both insurers were jointly liable. Each policy provided expressly that if the assured carried other in-

surance against a loss covered by the policy, then the insurer would not be liable for a larger proportion of the entire loss than the amount payable under its policy bore to the total amount of collectible insurance. Neither contained any provision to the effect that the insurance afforded thereby was to be considered as excess insurance in the event the assured carried other collectible insurance covering the same loss. It is obvious that if insurance is pro-rata it cannot at the same time be excess insurance as to the same loss. The effect of a provision for the proration of an insurance loss is to require the several insurers of the same risk to share the total loss. If a policy be considered as excess insurance the idea of sharing the loss is negatived, for the excess insurer is liable only for the amount of the loss in excess of the limits of other valid and collectible insurance covering the same loss. By holding that Pacific was an excess or secondary insurer, the trial court completely vitiated the provision for the proration of loss as expressed in the policy. An insurance policy is to be construed like any other contract, and where there is no ambiguity in the language used it must be construed in accordance with the intention of the parties. *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 P. 872, 23 Am. St. Rep. 460. The intention of the parties to the Pacific policy, as expressed in the provision for proration of the loss, being unambiguous, must govern. Had the parties intended the Pacific policy to be excess insurance, it would have been a simple matter to express such contention by appropriate language in the policy. Not having done so, they are bound by the express terms of the policy.

* * * * * * * *

Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and we know of no law in this state fixing degrees of liability in relation to the joint liability for torts. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone (*Schilling v. Central California Traction Co.,* 115 Cal. App. 30, 1 P. 2d 53), or against both jointly, it would seem that there could be no such thing as primary and secondary liability. Moreover, the court made no finding on the issue of primary and secondary liability as between Harvey and plaintiff, and in fact made no finding concerning the relationship existing between Harvey and plaintiff out of which the latter's liability arose. In view of our conclusion that both policies insured the same risk so far as plaintiff is concerned, the fact that plaintiff's liability may have been primary or secondary becomes immaterial. Regardless of the nature of such liability, any loss resulting therefrom was covered by both insurers.

Judgment reversed."

Again in *Lamb v. Belt Casualty Co.,* 3 Cal. App. (2d) 624, 40 P. (2d) 311, the California courts hold to the equitable rule of pro-rating the liability of insurance carriers, where double insurance is found to exist. In that case the insured operated a truck and trailer. He carried a policy of automobile insurance with Belt Casualty Company on the trailer with limits of $5,000.00 applicable to injuries or death of one person and $10,000.00 for two or more persons in one accident. American Indemnity Company issued a policy of automobile liability insurance

on the truck in which its limits were stated to be $50,000.00 as applicable for injuries or death of one person and $100,000.00 on one accident. American Indemnity policy provided specifically "damage done to or by said trailer shall not be construed to be covered hereunder." That policy contained the further provision:

> "No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected; provided, if the assured carries a policy of any other insurer covering concurrently a claim covered by this policy under property damage and/or liability peril clauses herein he shall not recover from the Company a larger proportion of any such claims than the sum hereby insured bears to the whole amount of such valid and collectible concurrent insurance."

The Belt Company policy contained the following provisions:

> "If the named assured has any other insurance applicable to a claim covered by this policy, the company shall not be obliged under this policy to pay a larger proportion of or on account of any such claim than the limit of the Company's liability under this policy, applicable to such claim, bears to the total corresponding limits of the whole amount of valid and collectible insurance. If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, the said other person, firm or corporation shall not be entitled to protection under this policy."

While both policies were in effect, two persons while riding in another automobile collided with the rear of the trailer at night, it being drawn and propelled by the truck at the time. The tail light connection between the truck and trailer had broken, and therefore, the trailer was unlighted. Absence of a tail light was the ground upon which recovery of damages was had.

At page 315 of 40 P. (2d), the court points out:

> "The total liability of the insured on account of the judgments in the two damage actions amounted to $14,632.07. In the absence of other insurance, the American Indemnity Company would be liable to indemnify the insured in this amount on the one hand, and the Belt Casualty Company and Lloyds of London on the other. The assured, however, having contracts of insurance with different companies insuring against the same liability, the provisions of the policies relating to such situations must be looked to and the liability be apportioned according to the contracts."

Having determined that the policies of the two companies named, were the only ones applicable, the court proceeded as follows:

> "This leaves only the policies of the American Indemnity Company and of the Belt Casualty Company to be considered, each of which provides that the liability thereunder shall be that proportion of the total liability which the limits of the policy bear to the whole amount of such collectible insurance. The trial court applied this method in apportioning the liability, which method we hold to be correct."

There is no important distinguishing feature to be found between the case just cited, and the proposition under

consideration here. In that case the named insured was identical in both policies under consideration by the Court. In the instant case, Page is also named as an insured in both policies. In *Lamb v. Belt Casualty Company, supra,* the American Indemnity Company policy provided in part (40 P. (2d) 311, 315):

> "No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected; * * *."

Notwithstanding such provision, the trial court applied the rule that each company was liable for "that proportion of the total liability which the limits of the policy bears to the whole amount of such collectible insurance." The reviewing court affirmed.

4. The Court Erred in Failing to Follow the Rule of Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

United most seriously urges that the District Court erred in several respects by failing to follow the rule of *Erie Railroad Company v. Tompkins, supra.* The most grievous error of the trial court was in disregarding the California rule which has been followed by this Court that a rider attached to a policy takes precedence over the language contained in the body of the contract. (*Tarleton v. DeVeuve, supra.*) By its failure to apply that rule, the trial court limited the coverage of Ohio's policy and restricted it to cover only McKeon and Page dba Pacific Laundry, denying the existence of the broader coverage admittedly contained in Ohio's policy, had the vehicle been

registered to the name of McKeon and Page dba Pacific Laundry. In this, it is contended that the Court unduly restricted Ohio's policy.

United maintains further that the trial court failed to follow the correct rule with regard to partnerships in California and also failed to apply the provision of the Insurance Code to the effect that one named as insured in a policy of insurance is an owner within the meaning of the statute applicable to all contracts of insurance covering motor vehicles. (Section 383.5, Insurance Code of California, *supra.*)

United further contends that the Court also erred by failing to follow the two decisions of the California courts with respect to double insurance discussed in the foregoing subdivision of this argument. (*Consolidated Shippers v. Pacific Employers Ins. Co. supra,* and *Lamb v. Belt Casualty Co., supra.*) As this Court has held, both policies of insurance were California contracts and the law of California should have been applied. (*Gates v. General Casualty Co. of America,* 9 Cir., 120 F. (2d) 925.)

Conclusion.

In conclusion, it is respectfully submitted that the District Court erred in the respects pointed out in the foregoing brief. United appeals from the holding of the Court that it is required to make Ohio whole for any loss it may sustain. The companies have settled the case, each paying one-half of the loss. [TR. 208.] United does not find particular fault with its actual position as matters now stand, but does earnestly complain of its obligation, under the decision of the District Court, to reimburse Ohio fully as soon as Ohio reduces its purported claim

against Gilbert to judgment. At the risk of stating a fact outside the record, it is felt that this Court should be fully informed, and in candor and fairness, United now informs the Court that Ohio has an action pending in the District Court of Douglas County, Nebraska, against Gilbert and that it looks to United to satisfy any judgment it obtains in said action against Gilbert.

The principles of equity have not been applied by the District Court. There is no equity or justice in relieving Ohio from the responsibility it contracted for when issuing its policy to McKeon and Page dba Pacific Laundry. As pointed out by the Court in *Universal Indemnity Ins. Co. v. Caltagirone et al., supra*, the money paid by the Indemnity Company for the judgment was the accumulated premiums paid by its insured against the day when the latter would be called upon to pay a loss.

All of which is

Respectfully submitted,

HARRY E. SACKETT,
RAYMOND G. BROWN,
Attorneys for Plaintiff.